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No. 90-745

Supreme Court, U.S.
FILED
JAN 16 1991
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

LINDA WHEELER TARPEH-DOE,
INDIVIDUALLY AND AS MOTHER AND NEXT FRIEND
OF NYENPAN TARPEH-DOE, PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT*

BRIEF FOR THE RESPONDENTS IN OPPOSITION

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

ROBERT S. GREENSPAN
WILLIAM G. COLE
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the Secretary of State's discretionary authority to pay foreign tort claims in connection with Department of State operations abroad creates a property interest to which the Due Process Clause applies.

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OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-16a, is reported at 904 F.2d 719. The opinion of the district court, Pet. App. 17a-25a, is reported at 712 F. Supp. 1.

JURISDICTION

The judgment of the court of appeals was entered on June 8, 1990. A petition for rehearing was denied on August 13, 1990. Pet. App. 46a. The petition for a writ of certiorari was filed on November 9, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner Linda Wheeler Tarpeh-Doe gave birth in Liberia to a baby who contracted infections leading to permanent brain damage. Petitioners filed an administrative tort claim in which they alleged that the negligence of State Department employees caused the baby's injury. The State Department's investigation of petitioners' claim determined that the baby's injuries were not the fault of any government employee, and the Secretary of State's designee denied the claim. Petitioners filed suit charging that the administrative claims process followed in their case violated the Due Process Clause of the Fifth Amendment. The district court agreed and on that premise ordered the disclosure of certain information and reconsideration of petitioners' claim. On appeal, the court of appeals reversed on the ground that no statute or regulation gave petitioners a property interest protected by the Due Process Clause.

1. According to the second amended complaint, petitioner Linda Wheeler Tarpeh-Doe was an International Development Intern with the Agency for International Development. In 1981, she was assigned to the American Embassy in Monrovia, Liberia. On May 18, 1982, she gave birth to Nyenpan Tarpeh-Doe II. Less than three weeks later, the baby became very ill, and an embassy physician ordered the baby evacuated immediately to the United States. The evacuation order was countermanded later that day, however, after the embassy physician had the baby examined by an American missionary doctor who was in charge of the pediatric ward at John F. Kennedy Hospital in Monrovia The pediatrician ordered the child transfered to Kennedy Hospital because he believed he could treat the baby. Mrs. Tarpeh-Doe

and her husband objected to the transfer and demanded that their baby be evacuated as originally planned, but the embassy physician agreed with the pediatrician and declined to order the evacuation. On June 17, 1982—after 12 days during which the baby's condition showed no improvement—the baby was evacuated to the United States. The child, who is blind and has suffered permanent brain damage, is currently institutionalized in Denver. C.A. App. 13-19.

2. In 1984, petitioners filed an administrative tort claim with the Department of State alleging negligence by the Department and its employees. C.A. App. 23. The claim invoked the first paragraph of 28 U.S.C. 2672 of the Federal Tort Claims Act (FTCA). That paragraph authorizes the head of each federal agency to consider any claim for money damages against the United States arising from the negligence of any agency employee while acting in the scope of his employment. Although the FTCA itself does not apply to "[a]ny claim arising in a foreign country," 28 U.S.C. 2680(k), the Act of August 1, 1956, ch. 841, § 2(f), 70 Stat. 890, provides:

> [T]he Secretary of State may use funds appropriated or otherwise available to the Secretary to—
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> * * * * *
>
> (f) pay tort claims, in the manner authorized in the first paragraph of section 2672, as amended, of title 28, when such claims arise in foreign countries in connection with Department of State operations abroad.

22 U.S.C. 2669(f).

Regulations promulgated under the Act of August 1, 1956, establish the procedures by which the

Secretary of State will exercise his discretionary authority to pay foreign tort claims. See 22 C.F.R. Pt. 31. Section 31.6(a) states that the "Foreign Service establishment" out of whose activities the claim arose "shall make such investigations as may be necessary or appropriate" and "thereafter shall forward the claim, together with all pertinent material, and a recommendation, based on the merits of the case, with regard to allowance or disallowance of the claim." Section 31.7 states that "[c]laims will be determined in accord with the applicable statute and the applicable subpart of this part." The applicable statute (the Act of August 1, 1956) requires that the claim satisfy the first paragraph of 28 U.S.C. 2672. See 22 U.S.C. 2669(f). The applicable subparts of 22 C.F.R. Pt. 31 make further provision with respect to adjustment or settlement of claims, 22 C.F.R. 31.8, payment of claims, 22 C.F.R. 31.9, and denial of claims, 22 C.F.R. 31.10,[1] but do not require the payment of foreign tort claims merely because payment is consistent with the governing statute.

3. Upon receiving petitioners' claim, a claims attorney in the State Department began an investigation. The attorney conducted interviews with persons familiar with the case, consulted outside ex-

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[1] 22 C.F.R. 31.10 provides in full as follows:

> Final denial of an administrative claim shall be in writing and sent to the claimant, his or her attorney, or legal representative by certified or registered mail. Except in the case of claims arising in foreign countries, the notification of final denial shall contain a statement that if the claimant is dissatisfied with the decision, he may file suit in an appropriate U.S. District Court not later than 6 months after the date of the notification.

perts, reviewed relevant documents, and met with petitioners' counsel. Pet. App. 3a.

In a detailed memorandum, App., *infra*, 1a-25a, the claims attorney concluded that "most or all" of the baby's neurological damage was caused by an "infection [that] had already occurred when the child was brought in to the Embassy health clinic, and that the treatment received was prompt and effective in eliminating the infection," *id.* at 21a.[2] The attorney found that the baby had been ill for at least

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[2] We reproduce the claims attorney's memorandum because amici American Foreign Service Ass'n et al. claim that it constitutes an "impermissible secret law" and that it improperly applied Liberian law. Amici Br. 8-9. Amici also promise that these issues "will be more particularly described in Petitioner's Reply to the Opposition to Petition for Certiorari." *Id.* at 9.

Review of the claims attorney's memorandum reveals a careful and comprehensive investigation of petitioners' claim. Despite the sinister connotations of amici's reference to "secret law," the district court held only that the memorandum "would, *unless disclosed*, be impermissible 'secret law,' " *Tarpeh-Doe* v. *United States*, No. 88-0270-LFO (D.D.C. Nov. 13, 1990), slip op. 10 (emphasis added), because it constituted "the essence of the decision making process," *id.* at 7. The discovery dispute to which the district court decision refers—whether the memorandum is privileged or otherwise protected from disclosure—has absolutely no relevance to the question presented here and casts no doubt on the propriety of the State Department action in this case.

The choice of law question to which amici allude is likewise irrelevant to the proper disposition of this petition. But we note that insofar as the memorandum looked to Liberian law, it is consistent with the reference, in the first paragraph of 28 U.S.C. 2672, to "the law of the place where the act or omission occurred." Moreover, in view of the analysis and conclusions reached in the memorandum, it does not appear that the source of applicable law was of controlling significance.

three days before Mrs. Tarpeh-Doe brought him to the embassy clinic, and that the baby's infections had not received medical attention even though a government physician and nurse treated Mrs. Tarpeh-Doe at her home for post-natal infections during this period. *Id.* at 3a, 13a. When Mrs. Tarpeh-Doe and her husband finally brought the baby to the embassy clinic, his situation was grave: he had large lesions on his groin, buttocks, and legs and had suffered a seizure earlier that morning. *Id.* at 13a. The embassy physician, alone except for the presence of a clinical nurse, had to make a "clinical decision on the spot" and decided to administer antibiotics to counter the infection. *Id.* at 14a. On the basis of his interviews with medical professionals, the claims attorney determined that the physician's decision was correct. *Id.* at 14a-15a. The antibiotics that he administered did not mask a salmonella infection; the preexisting infection—not salmonella—caused the baby's injuries; and the antibiotics were effective against salmonella. *Ibid.*[3]

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[3] Although petitioners alleged that the embassy physician was negligent in not evacuating the baby to the United States as originally planned, the claims attorney found that the embassy physician and pediatrician "together determined that the risk that the gravely ill child would not survive evacuation to the United States outweighed the advantages of the medical care available in the U.S." App., *infra*, 15a; see *id.* at 5a, 7a. Instead of evacuating the baby to the United States, the attending physicians placed him in Kennedy Hospital, where the pediatrician—"the best qualified and most experienced physician in Liberia for treating neonatal meningitis," *id.* at 25a—could closely supervise his care. Although the conditions of the hospital were "deplorable" by U.S. standards, the baby was moved to a more

Based on his findings that the damage had occurred before the baby was brought to the embassy clinic, and that the doctors rendered proper care under the circumstances, the claims attorney recommended that petitioners' claim be denied. App., *infra*, 25a. Before drafting his final recommendation, the claims attorney met with petitioners' counsel to discuss his investigation. C.A. App. 92. At the meeting, the claims attorney "addressed each element" of petitioners' claim and stated "the bases for [his] views thereon." *Ibid.* In particular, the claims attorney stated that "the principal theory of the claim [that the baby's injuries were caused by a salmonella infection] was not substantiated based on the documents submitted to the [State] Department on behalf of the claimant and confirmed by the experts with whom [the attorney] consulted." *Id.* at 92-93. In light of his discovery that the preexisting infection was responsible for the baby's injuries, the claims attorney noted the "serious problem of proximate cause created by the factual circumstances." *Id.* at 93. The claims attorney's recommendation was forwarded to the Assistant Legal Advisor for Inter-

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distant hospital with "notably more sanitary" conditions the next morning. *Id.* at 5a-6a.

After 12 days of treatment, "the doctors determined that because of the baby's overall stable condition it would be safe to medevac him." App., *infra*, 7a. The doctors' concern about the stress of evacuation on the baby was borne out by the event. The evacuation took more than 22 hours and weakened the baby to the point where "[i]t was necessary to give mouth-to-mouth breathing." *Ibid.* Upon arrival in the United States, the baby was admitted to the University of Colorado hospital and released a little more than two weeks later. *Id.* at 8a. He is currently a full-time patient at a Colorado facility at state expense. *Ibid.*

national Claims and Investment Disputes, who issued a formal denial of petitioners' claim in a letter sent by certified mail.[4] Pet. App. 31a-32a. The letter did not repeat the bases for denying petitioners' claim. *Ibid.*

4. Petitioners filed suit against the United States and the Secretary of State under the FTCA. The district court granted partial summary judgment for petitioners.[5] The court held that the State Department's procedures for resolving foreign tort claims violate the Fifth Amendment's Due Process Clause because they fail to require disclosure of the evidence on which a claim has been denied. Pet. App. 23a-24a. The district court remanded the case to the State Department for reconsideration, and required the Department to:

> (1) disclose to plaintiffs the evidence relied upon in the original denial of their claim and to be relied upon in reconsideration of it, (2) afford plaintiffs an adequate opportunity to comment on and counter that evidence, and (3) make and provide to plaintiffs findings of fact that address the evidence relied upon by the decisionmaker in the original decision and the reconsideration of it, and any comment or counter submitted by

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[4] Petitioners assert that the Assistant Legal Advisor was "not authorized" to act on petitioner's claim. Pet. 6 n.5. Petitioners do not present that issue for this Court's review, and in fact, the Assistant Legal Advisor had authority, on the basis of long-standing State Department practice, to deny administrative tort claims. That practice now appears at 22 C.F.R. 31.2 (codified Nov. 11, 1987).

[5] The balance of the case—which involves alleged negligent acts or omissions in the United States—has since been tried before the district judge. No judgment has been entered.

> plaintiffs in response to evidence disclosed to them.

Id. at 25a.

On appeal, the court of appeals reversed.[6] Pet. App. 1a-10a. It explained that this Court has required individuals asserting a constitutional right to certain procedures to demonstrate that they have been deprived of a protected liberty or property interest. *Id.* at 7a. Only interests that rest on a "legitimate entitlement" as opposed to "an abstract need or desire" are considered "protected interests." *Ibid.* (quoting *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972)). Whether a given statutory scheme gives rise to a protected interest depends on whether the statutes or regulations making up that "scheme" direct officials that if the "substantive predicates are present, a particular outcome must follow." Pet. App. 7a (quoting *Kentucky Dep't of Corrections* v. *Thompson*, 109 S. Ct. 1904, 1910 (1989)). Applying those principles, the court ruled that:

> [t]he plain language of § 2669(f) does not give a claimant the right to demand either payment of tort claims or procedures for the consideration of such claims.

Pet. App. 8a. The court of appeals also held that the regulations promulgated to implement the Act of August 1, 1956, entitled a claimant only to an investigation and to the decision maker's opportunity to review the claim and the results of the investiga-

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[6] Petitioners moved to dismiss the appeal for lack of jurisdiction. By order issued November 9, 1989, the court of appeals denied the motion, ruling that the district court's decision was an appealable collateral order under *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949).

tion. *Ibid.* Thus, neither the statute nor the regulations "provide[d] a sufficient basis for the district court's conclusion that the administrative scheme for handling tort claims arising abroad implicates the due process clause." *Id.* at 9a.

Chief Judge Wald dissented. Pet. App. 11a-16a. She concluded that "the Regulations do explicitly and implicitly assume that an administrative claim, foreign or domestic, will be decided on the same legal and equitable principles that govern court determinations." *Id.* at 15a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Analysis of the question presented—whether petitioners have a liberty or property interest protected by the Fifth Amendment's Due Process Clause—requires identification of the interests they seek to protect. Petitioners claim that this case involves "denial of a claim for congressionally-authorized benefits." Pet. 14. Those "benefits" appear to be financial compensation "to Mrs. Tarpeh-Doe and her son to assist their recovery from injury," Pet. 15, and "a merit-based decision pursuant to the criteria set forth in the Department's regulations," Pet. 16.

a. Petitioners' understandable desire for financial compensation is not a property interest protected by the Due Process Clause. It is well settled that the Clause "is not implicated by the lack of due care of an official causing unintended injury to life, liberty, or property. In other words, where a government official is merely negligent in causing the injury, no

procedure for compensation is constitutionally required." *Davidson* v. *Cannon*, 474 U.S. 344, 347 (1986); see *Daniels* v. *Williams*, 474 U.S. 327, 333 (1986). Petitioners' complaint alleges at most negligent conduct by the embassy physician in rendering professional care. C.A. App. 19-30. The interest in compensation for injury negligently inflicted by government agents is not by itself sufficient to invoke the Due Process Clause.

b. Petitioners' claimed property interest in a "merit-based decision" is not supported by either the governing statute or applicable regulations, and is not protected by the Due Process Clause.

The Act of August 1, 1956, creates no entitlement to a merit-based decision because the language of the Act ("[t]he Secretary of State *may* use funds" (emphasis added)) is entirely discretionary. 22 U.S.C. 2669(f). As this Court held in *Olim* v. *Wakinekona*, 461 U.S. 238 (1983):

> Process is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement.

Id. at 250. If no entitlement exists, as in this case where the decisionmakers' discretion is unfettered, due process protection does not attach. *Id.* at 250 n.10.

Nor is such an entitlement created by the Secretary of State's regulations. As explained at p. 4, *supra*, the regulations require only that the responsible foreign service establishment conduct an investigation and that the claim and results of the investigation be submitted to the ultimate decisionmaker for review. 22 C.F.R. 31.6(a). As the court of appeals

correctly observed, "this is where the chain necessary to [petitioners'] claim of entitlement ends":

> As noted, the Regulations nowhere provide that the decisionmaker must comply with the recommendation prepared by the officer investigating the claim's validity or, alternatively, that the decisionmaker must provide a statement of reasons for not following the investigator's recommendation. We cannot say, therefore, that the Secretary has erred in construing his own Regulations not to *require* the Department to pay claims *even* if the investigator determines that the claim is valid and recommends payment.

Pet. App. 8a-9a.

In her dissent, Chief Judge Wald relied entirely on what she regarded as a "crucial sentence" in 22 C.F.R. 31.18. Pet. App. 14a. That provision, which constitutes all of Subpart C of the regulations, reads in its entirety:

> The act of August 1, 1956 (5 U.S.C. 170g) authorizes the Secretary of State, when funds are appropriated therefor, to pay tort claims in the manner authorized in the first paragraph of 28 U.S.C. 2672, as amended, when such claims arise in foreign countries in connection with Department of State operations abroad. Consequently, the Federal Tort Claims Act and Subpart B of this part are applicable to claims filed under the act of August 1, 1956, except that no provision has been made in that act for the institution of suit if a claim is denied.

Judge Wald read into the second sentence of the provision a requirement that the Secretary "pay meritorious claims." Pet. App. 14a. But neither the sentence in itself nor the provision of which it is a

part can bear such an extraordinary weight. On the contrary, the provision simply echoes the congressional extension, to foreign tort claims, of the authorization in the first paragraph of 28 U.S.C. 2672, and the consequent extension to those claims of the administrative procedures of Subpart B of the Secretary's regulations.

2. Petitioners offer a variety of reasons for this Court's review. None of them has merit.

a. First, petitioners contend that the court of appeals' decision creates a "conflict with the majority of the circuits," Pet. 12, 14, which find property interests when "the state creates an entitlement to general assistance," Pet. 14 (citing *Gregory* v. *Town of Pittsfield*, 470 U.S. 1018, 1021-1022 (1985) (O'Connor, J., dissenting from denial of certiorari)). But whether or not those decisions are correct,[7] this is not an entitlement case. The governing statute and regulations, examined above, establish that petitioners have no entitlement to compensation for torts committed by government agents outside the United States.

b. Second, petitioners argue that the court of appeals' decision conflicts with this Court's decision in *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982). Pet. 17. In *Logan*, this Court reaffirmed the holding in *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 311-315 (1950), that "a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause." 455 U.S. at 428.

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[7] Cf. *Lyng* v. *Payne*, 476 U.S. 926, 942 (1986) ("We have never held that applicants for benefits, as distinct from those already receiving them, have a legitimate claim of entitlement protected by the Due Process Clause of the Fifth or Fourteenth Amendment.").

In *Logan* and *Mullane*, the claimant's "right to redress [wa]s guaranteed by the State, with the adequacy of his claim assessed under what [wa]s, in essence, a 'for cause' standard." 455 U.S. at 431; see *id.* at 430 ("The hallmark of property * * * is an individual entitlement * * * which cannot be removed except 'for cause.' "). In this case, by contrast, petitioners have no right to redress. Congress's authorization to pay foreign tort claims is merely permissive. Although the State Department's regulations require the observance of certain procedural steps, they do not establish a cause of action such as would create a property right protected by the Due Process Clause.

c. Third, petitioners claim that the decision below "encourages arbitrary treatment of claimants." Pet. 19. They find it "difficult to conceive of any rational reason why the Department should be free to deny meritorious claims." Pet. 27.

In fact, it appears that Congress's primary purpose in vesting the Secretary with discretion was to reduce the volume of private bills. As petitioners acknowledge in their chronology of the FTCA, Pet. 21, Congress retained sovereign immunity from foreign tort claims when it enacted the FTCA in 1946. For the next decade, Congress continued the practice of entertaining private bills to compensate the victims of tortious conduct committed by government agents abroad. Congress enacted the Act of August 1, 1956, to give the Secretary the authority, "in the event of an automobile accident or some other tort claims abroad," to settle those claims "without a great deal of red tape." H.R. Rep. No. 2508, 84th Cong., 2d Sess. 9 (1956). This description of the purpose of the 1956 Act suggests that it was primarily intended to transfer the discretionary compensation function

from Congress (which could act only by private bill) to the Secretary of State (who could establish an informal administrative process "without a great deal of red tape"). The process adopted by the State Department is entirely in keeping with that objective.

Of course, Congress could have reduced the volume of private bills simply by removing the FTCA exemption for foreign torts. That Congress instead authorized discretionary payments of foreign tort claims suggests an additional purpose: to give the Secretary of State flexibility in compensating claims for tortious conduct originating in the territory of another sovereign. As attested by the Assistant Legal Advisor, "[t]he discretionary structure of 22 U.S.C. § 2669(f) and its implementing regulations permits the Department to take foreign policy interests into account in the disposition of foreign tort claims." C.A. App. 97-98. The question whether to pay in a given case is affected by a variety of factors in the foreign policy context. These factors include whether intelligence or confidential activities are involved and whether a foreign government may take offense. Because the foreign policy interests of the United States might require denial of a claim in an appropriate case, Congress may well have found it important that the system for compensating foreign torts be informal as well as discretionary. A holding that Congress must provide a formal, adversary compensation system if it provides an administrative claims process at all might force it to return to the practice of entertaining private bills. Such a reversion would benefit neither claimants nor the Congress.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

ROBERT S. GREENSPAN
WILLIAM G. COLE
Attorneys

JANUARY 1991

APPENDIX

[Seal]

United States Department of State
Washington, D.C. 20520

October 2, 1987

MEMORANDUM

TO: L/CID—Mr. Bettauer

FROM: L/CID—H. Rowan Gaither

SUBJECT: FTCA Claim of Linda Wheeler Tarpeh-Doe

I. Statement of Facts

On December 29, 1980, Linda Wheeler entered on duty with the Agency for International Development (AID). On that date she also began an orientation session, a portion of which was dedicated to maternity rights for those posted abroad. Miss Wheeler completed the course and is presumed to have attended the portion on maternity rights.

Miss Wheeler was assigned to Monrovia, Liberia, in May of 1981. Shortly after she arrived she met Nyenpan Tarpeh-Doe, a former Liberian police officer. They were married in December 1981. On May 18, 1982, a baby, Nyenpan Tarpeh-Doe II was born. The delivery was performed by a Liberian physician, C. Archibald Johnson, M.D., who specialized in Obstetrics and General Practice. Mrs. Tarpeh-Doe did not consult the health unit of the U.S. Embassy in Monrovia in connection with her pregnancy. Mrs. Tarpeh-Doe, however, had been advised on a personal

basis by the Embassy laboratory technician and other friends to have delivery of the baby outside of Liberia, but she decided to have the delivery in country.

After the baby's birth, probably during the second week, Mrs. Tarpeh-Doe developed severe bilateral mastitis (an infection in both her breasts) and temporarily stopped breast feeding the baby; in addition, she had an infected episiotomy (the incision made in her vulva to facilitate childbirth). She was given ampicillin by local health care providers for these infections. She was also receiving treatment for malaria. Cultures later taken from Mrs. Tarpeh-Doe's milk at the Embassy health clinic (on June 7) grew gram-positive staphylococcus bacteria.

The records show that on June 2, the baby developed a rash on his perineum (the pelvic region). On the evening of June 3, a U.S. Government doctor, Dr. Feir, and nurse, Billie Clement, R.N., visited Mrs. Tarpeh-Doe at her residence to examine her for her post-natal infections. Mr. Tarpeh-Doe, baby Nyenpan, and several other adults and children were also present. The residence was described as clean and neat. Mrs. Tarpeh-Doe's temperature was 104 degrees. Neither Mrs. Tarpeh-Doe nor Mr. Tarpeh-Doe mentioned the baby's condition, nor did they request that he be examined. Mr. Tarpeh-Doe was observed attempting to give the baby water. Mrs. Tarpeh-Doe was told to go to the Embassy clinic the next day.

Sometime that evening the baby began to show additional signs of illness. He stopped eating, and slept through the night. In the morning Mrs. Tarpeh-Doe went to the Embassy clinic for the requested follow-up examination, which was performed by Dr. Theodore Lefton, M.D., the physician in charge of the unit. She did not take the baby with her. That day

the baby stopped crying, developed a fever, and slept continuously. The parents took him to two local clinics that afternoon and evening, where he was given an electrolyte solution and oral ampicillin. That night he continued to be lethargic and have spiking fevers. He did not wet his diaper all night. He had not passed stool in six days. At 6.00 AM on June 5, a Saturday, the parents noticed a stiffening of the child, later diagnosed as a seizure. They decided to take the baby to Dr. Johnson that morning, and ran into the Embassy nurse, Billie Clement on her way home from the Embassy clinic at 10:29 AM. They were very upset and asked if she could help them, that they didn't know what was wrong with their baby. Nurse Clement could see that the baby was very ill, and she advised the parents to go to the Embassy clinic. They agreed, and she accompanied them there. Nurse Clement then called Dr. Lefton from the clinic.

Dr. Lefton arrived at the health unit at 10:30 AM. This was the first time he had seen the child. He saw immediately that the baby was gravely ill, and determined that the child required more treatment than the clinic could provide. Accordingly, he sent the medical technologist, Mary Awantang, out to locate Dr. David Van Reken, an American missionary physician in charge of the pediatric ward at John F. Kennedy hospital in Monrovia, and to bring him back to examine the baby. Because telephones in the city were not working, however, Dr. Lefton could not be sure until Ms. Awantang returned whether Dr. Van Reken would be available.

Dr. Lefton examined the baby, noted pustular lesions and blisters over the entire buttocks, scrotum and penis, and extending down the legs and up to the umbilicus, noted a rectal temperature of 101.8 de-

grees, and made a diagnosis of sepsis and probably meningitis. Dr. Lefton made a qualified statement to the parents, noted in the medical record, that if he could not contact Dr. Van Reken to treat the baby he would have the baby airlifted to a hospital in the United States by medevac that evening. He administered procaine penicillin 150,000 units I.M. and 8 milligrams of Gentamicin I.M. The baby subsequently had a seizure, and Dr. Lefton administered 15 mg. phenobarbitol I.M. at 10:50 AM.

Dr. Van Reken arrived at 11:30 AM. The baby's rectal temperature was 102.2 degrees and he had had several seizures since being brought to the Embassy clinic. Dr. Van Reken administered 3 mg. valium I.M. to control the seizures. Dr. Lefton, Dr. Van Reken, and Nurse Clement then discussed the continued feasibility of a medevac and agreed that the child was now too critical to survive a medevac. A spinal tap was done with the assistance of Ms. Awantang, and a heel prick was done to obtain a blood test sample. The spinal tap produced a clear spinal fluid, and a gram stain showed rare gram-positive cocci. Cultures, however, showed no growth at 24, 36, or 48 hours. A gram stain of a skin pustule was obtained, and small gram-positive cocci were found. A culture was also taken and it produced a heavy growth of gram-positive cocci, subsequently shown to be *staphylococcus aureas.* These bacteria were shown to be resistant to penicillin and ampicillin, and sensitive to methicillin, erythroycin, and chloramphenocol. They were the same bacteria grown earlier from cultures of the mother's breast milk. The baby pased a stool, and cultures, including a salmonella-shigella agar culture, were done. These cultures showed growths of *staphylococcus aureas* identical to those cultured from the skin pustules and

from the mother's breast milk. No salmonella bacteria were grown. Malaria tests from the blood sample were negative.

Dr. Van Reken then recommended that the baby be admitted to John F. Kennedy Medical Center in Monrovia where he could be under his care. Dr. Van Reken worked at this hospital and was of the view that if the child were there he could more closely observe him. The alternative, the ELWA Hospital, was across town. The parents objected because of the hospital's reputation for uncleanliness, and requested that the baby be evacuated by airlift to the U.S. Dr. Van Reken and Dr. Lefton refused to give permission to evacuate the baby, however, based on their determination that the baby could not be safely airlifted until his condition stabilized. Apparently, the basis of the doctors' decision was either not clearly communicated or not clearly understood by Mrs. Tarpeh-Doe.

Dr. Lefton agreed that the baby should go to JFK hospital and be under Dr. Van Reken's care, and the baby was taken by ambulance to the JFK hospital despite the parents' protests, where a course of treatment including I.V. penicillin, chloramphenacol, and phenobarbitol was begun. The baby continued to record rectal temperatures to 102-103 degrees, and had seizures lasting 20-30 seconds every hour throughout the night.

The conditions of the hospital were deplorable by U.S. standards. That night Mrs. Tarpeh-Doe, who was herself still ill, saw cockroaches in the baby's isolette, some even crawling over the baby's skin (which had open lesions), and saw rats present in the room. The parents insisted that the baby be moved the next morning. A room in the ELWA hospital, Monrovia, was found, and he was taken there

by ambulance. Dr. Van Reken continued to manage the baby, along with the help of Dr. Lefton and the physicians at ELWA. The conditions at ELWA were notably more sanitary than at JFK.

The previous day, Saturday, a friend of Mrs. Tarpeh-Doe had contacted her mother in Colorado, who subsequently notified the Department in Washington that she had made arrangements for the child to be received at the University of Colorado Hospital when it would be evacuated.

The baby's seizures ceased on June 6, the first day in ELWA hospital, and he began to sleep. On June 8, the baby became afebrile, and on occasion became hypothermic, whereupon his temperature was stabilized in a warm isolette with blankets. On June 9 his temperature rose again several times to 101.4 degrees. A spinal tap was performed, which produced clear spinal fluid, and blood was drawn. Gram stains and acid-fast stains of both blood and fluid showed no bacteria. All the cultures done on June 5 were repeated, and showed no growth of bacteria. Samples were also sent by diplomatic pouch to Washington for a counter-immuno-electrophoresis test, but an error was made in the instructions by the Department to the laboratory and this test was never done. Results of the test actually done, an immuno-electrophoresis test, were never sent to the Embassy in Liberia for use by Dr. Van Reken.

From June 10 the baby's fever subsided, and he remained afebrile through June 15. The phenobarbitol was also discontinued, and during the period from June 10 through June 15 he became progressively more awake and alert, each day doing something he could not do the day before: spontaneous arm movements, swallowing saliva, blinking eyes to noises, opening eyes when stimulated, opening eyes

spontaneously, yawning, stretching, sucking and crying. Periodically the baby's scalp would accumulate I.V. fluid, and on June 13 antibiotics were begun by N.G. tube (through the nose). Feeding had been by N.G. tube since June 10. On June 15, the 11th day hospitalized, the baby began sucking electrolyte solution from a bottle. But that night his temperature went up to 103 degrees and he had a seizure, for which phenobarbitol was recommended. The baby's head circumference did not increase. On June 16, the baby's highest rectal temperature was 102 degrees and the doctors determined that because of the baby's overall stable condition it would be safe to medevac him the next evening.

The parents had several times over the previous twelve days demanded evacuation to the United States, but Dr. Van Reken, together with Dr. Lefton and the nursing staff determined it was not safe to transport the baby until his condition was stable.

The baby was flown with his parents and Nurse Clement to the University of Colorado Hospital. The flight was very long and difficult, and the entire trip lasted more than 22 hours. On board, Nurse Clement had care of the baby, including feeding and administration of antibiotics and other drugs. At the beginning of the flight the baby was afebrile, and she gave it formula by bottle. At some point his temperature rose to 101.4, but there was no seizure. Tylenol was given to reduce the temperature. The baby became progressively weaker, the sucking tiring him out. Nurse Clement then switched to feeding the baby by N.G. tube. His temperature rose again, and was reduced by Tylenol. The baby became progressively more lethargic and had periods of apnea (cessation of breathing). It was necessary to give mouth-to-mouth breathing.

The baby was admitted to the University of Colorado Hospital with a temperature of 37.6 degrees Celsius (99.7 degrees Fahrenheit). A spinal tap and blood sample were taken, and tests and cultures done. One blood culture grew salmonella type B bacteria, resistant to ampicillin, chloramphenicol, bactrim and keflex. No other bacteria were grown. The baby was given moxalactam and gentamicin, and by the second day was afebrile. However, he had several episodes of wide swings in temperature from hypo- to hyper-thermic. These were controlled by blankets and baths.

The baby was discharged on July 3, 1982, into the care of his parents. The University of Colorado Hospital discharge statement listed the hospital's diagnosis of the baby's condition upon admission as follows:

1) Salmonella sepsis
2) Status post gram-positive cocci meningitis
3) Severe neurological deficit secondary to #2
4) Monilial thrush infection

The discharge summary also stated that "[b]oth EEG and CT [exams] were consistent with a severe neurologic deficit which was a sequella from the prior meningitis."

The baby is blind and has severe brain damage. The baby has little hope of substantial development and will probably be hospitalized for the remainder of his life. His future is grim and his life span is shortened. At present the child has been adopted by his grandmother, Mrs. Tarpeh-Doe's mother, and is a full time patient at the Wheat Ridge Regional Center, a Colorado State facility, at state expense.

II. LIABILITY

A. Negligence

Claimant alleges that her child was entitled to the "best possible medical care" from Dr. Lefton at the Embassy health clinic in Monrovia, and states that an internal Department regulation establishes this level of care. Claimant alleges that certain acts and omissions of Doctors Lefton and Van Reken in Liberia and of Department employees in the United States fell below this standard of care and constitute negligence. Claimant alleges that it was negligent: (1) for Dr. Lefton to give the child antibiotics before obtaining cultures of the child's blood and spinal fluid; (2) for Dr. Lefton to fail to evacuate the child immediately upon diagnosing sepsis and meningitis but instead to permit the child to be admitted to a deplorably unsanitary hospital; (3) for Department of State employees in the United States to fail to ensure that the evacuation was immediately carried out by Dr. Lefton; (4) for Department of State employees in the United States to fail to perform the correct laboratory tests on fluid samples sent from Liberia for analysis, and to fail promptly to inform Dr. Lefton of the results of the tests actually carried out; (5) for Dr. Lefton and Dr. Van Reken to fail to diagnose and treat the alleged true cause of the child's sepsis and meningitis—salmonella bacteria; (6) for Dr. Lefton and Dr. Van Reken to fail to use the chocolate agar culture medium to detect bacteria present; (7) for the Department to fail properly to hire, train and supervise Dr. Lefton; and (8) for the Department and Dr. Lefton and Dr. Van Reken to fail to consult a neonatologist contacted by the child's grandmother in Colorado.

1. *Applicable standard of care.*

The Foreign Affairs Manual of the Department of State states as follows:

> The general medical policy of the Department of State is to assist all American employees and their dependents in obtaining the best possible medical care. This includes personnel of the Department and all agencies participating in the medical program by agreement. This policy extends to the most remote parts of the world, so that no employee need hesitate to accept an assignment to a post where health conditions are hazardous, medical service poor, or transportation facilities limited. Principal and administrative officers and their designees, and principal representatives of participating agencies are cautioned to be alert to any medical and health problems of employees and their dependents and to take appropriate action promptly. 3 Foreign Affairs Manual 681.2

Claimant asserts that this directive obligates the Department to provide literally the "best possible" medical care to its employees. Federal safety and procedure manuals, however, do not create an actionable duty on which tort liability may be based. *Zabala Clemente* v. *United States*, 567 F.2d 1140, 1144 (1st Cir. 1977), *cert. denied*, 435 U.S. 1006 (1978). They are only internal operational guidelines. FTCA liability will attach only if the law of the place in which the act occurred would impose liability for the same conduct required in the manual. *Le Seur* v. *United States*, 617 F.2d 1197, 1200 (5th Cir. 1980). Furthermore, despite its rather open-ended language, the directive cited by claimant does not establish that the

Department is committed to providing medical facilities at every diplomatic post equal to the best medical facilities in the world. The Department's goal is to provide the best care reasonably possible under the circumstances.

Claimant alleges negligence that occurred in the health clinic of the American Embassy in Monrovia, in two private hospitals in Monrovia, and in State Department offices in Washington, D.C. Thus, under 22 U.S.C. § 6669(f), the tort law applicable to this claim, depending on the particular allegation of negligence, is the law of the District of Columbia and Liberia. This office researched D.C. law; local counsel was retained in Monrovia to advise us on Liberian law.

(a) District of Columbia

Under the law of the District of Columbia, to sustain an action in negligence, the burden is on the plaintiff to show that there was (1) a duty of the defendant to the plaintiff that was breached, *Abbey* v. *Jackson*, 483 A.2d 330 (D.C. 1984), and (2) that the breach caused the injury suffered by the defendant. *Vintch* v. *Furr*, 482 A.2d 811 (D.C. 1984). With regard to breach of duty in an action for medical malpractice, plaintiff must show that defendant did not exercise "that degree of care and skill ordinarily exercised by the profession in his own or similar localities." *Quick* v. *Thurston*, 290 F.2d 360, 362 (D.C. Cir. 1961); *Rodgers* v. *Lawson*, 170 F.2d 157, 158 (D.C. Cir. 1948). With regard to causation, the defendant's negligent conduct is a legal cause of harm to plaintiff if his conduct is a substantial factor in bringing about the harm. *Graham* v. *Roberts*, 441 F.2d 995 (D.C. Cir. 1970) (citing *Restatement (Second) of Torts* § 431 (1965)).

(b) Liberia

The Liberian Private Wrongs Act of 1976 does not contain a specific cause of action for medical malpractice, nor is there any previous case law on the subject matter decided by the Supreme Court of Liberia. The Civil Procedure Law of 1972, however, identifies medical malpractice as one type of personal injury suit. Further, the Constitution of Liberia and several Supreme Court cases state that every person who is injured shall have a remedy for injuries suffered. Consequently it appears that Liberian law does allow a cause of action for medical malpractice, primarily based on common law principles of malfeasance.

The standard of care for medical services in Liberia requires that degree of care and skill which is ordinarily employed by the medical profession in Liberia under similar conditions and like surrounding circumstances. To be free of negligence, a doctor must have exercised the same reasonable and ordinary care, skill, and diligence as a physician in good standing in Liberia would have exercised in the same general line of practice and with the same facilities and equipment in a like case. The particular circumstances considered include the existing state of medical knowledge in Liberia and the established mode of practice, as well as limitations attending to the practice of medicine or the particular branch of medicine.

This standard is breached when the physician deviates from the standard. Although a physician is normally answerable where he is guilty of negligence in the actual treatment of the patient, liability may also be based on fraudulent concealment, such as the withholding of information, practicing without a license, or treating the patient without his consent or

beyond the scope of his consent. Damages are then assessed for injuries that result from the breach which are a natural and probable consequence of the wrongful act or omission. Damages may be for bodily suffering, for mental suffering accompanying bodily injury, for permanent impairment of the ability to earn money, disfigurement and its attendant discomfort, and expenses incurred in treating the wrong.

2. *Administration of antibiotics before obtaining culture.*

Claimant alleges that it was negligent for Dr. Lefton to give the baby Tarpeh-Doe antibiotics before taking samples of the child's body fluids for culturing. Administering the antibiotics masked the infection without eliminating it, alleges claimant, and caused the cultures when finally taken to be falsely negative for salmonella bacteria—the "true" cause of the child's illness.

Under the existing situation and considering the condition of the child, it was not negligent for Dr. Lefton to administer antibiotics to the child before taking culture samples. Under ordinary hospital conditions in the United States blood and spinal fluid samples are generally drawn for culturing before antibiotics are given, but Dr. Lefton was not working under ordinary conditions. Except for the clinic nurse, Dr. Lefton was alone. The child when finally brought in to the Embassy health unit had been ill for almost three days, had large pustular lesions on its buttocks and groin, extending down its legs and up to its umbilicus, and had had at least one seizure earlier that morning. Dr. Lefton properly diagnosed the child as suffering from severe sepsis and probably meningitis, and sent the clinic medical techni-

cian, Mary Awantang, to locate Dr. Van Reken, a local American pediatrician with considerable experience with meningitis. Because in cases of meningitis the time involved in treating the cause of the infection and halting it before it affects the brain is crucial in preventing permanent brain damage, it would have been inappropriate for Dr. Lefton to wait for Dr. Van Reken to arrive before beginning antibiotic treatment. There was no way to contact Dr. Van Reken by telephone, and Dr. Lefton could not be certain how long it would take Ms. Awantang to locate him, if at all. Lefton was also aware that the earliest the child could be placed on an airplane for medical evacuation was in eight hours. In such a situation, a doctor must make a clinical decision on the spot. It was not a breach of that degree of care and skill which is ordinarily employed by a physician in good standing in Liberia under similar conditions to decide to treat the cause of the illness threatening the child's neurological functions before taking culture samples. Furthermore, Dr. Van Reken arrived, and withdrew fluid samples for culture within an hour of Dr. Lefton's administration of antibiotics to the child. It cannot be determined definitely that the one hour was sufficient time for the antibiotics to mask a salmonella infection in all his body fluids.

Finally, as will be elaborated below, salmonella bacteria was not the cause of the child's sepsis and meningitis. The antibiotic treatment administered by Dr. Lefton was effective against both staphylococcus bacteria and the salmonella bacteria later cultured by the Colorado hospital. We know, however, that it did not mask the staphylococcus infection to the point that Dr. Van Reken was prevented from properly diagnosing and treating it. Cultures for salmonella were taken several times over the course of the child's

hospitalization in Liberia, and were negative. On the basis of the negative results of these tests, the diagnosis of the University of Colorado hospital, and our total investigation of the claim, we conclude that the salmonella infection later diagnosed by the Colorado hospital was a superinfection.

3. *Failure of Dr. Lefton to evacuate child immediately, and admission to a substandard hospital.*

Claimant alleges that Dr. Lefton was negligent in failing immediately to medevac the gravely ill child to a hospital in the United States. Claimant fails to establish that Dr. Lefton acted below the standard of care and skill ordinarily employed by physicians in good standing in Liberia under similar conditions and like surrounding circumstances. Because he had little experience in treating meningitis, Dr. Lefton made a qualified decision to evacuate the child unless Dr. Van Reken, a specialist in pediatric meningitis, could be located. Dr. Lefton had a standing arrangement with Pan Am for evacuations to be carried out on little notice. However, Dr. Van Reken did arrive, felt he could treat the child, and Dr. Lefton and Dr. Van Reken together determined that the risk that the gravely ill child would not survive evacution to the United States outweighed the advantages of the medical care available in the U.S. The child had seized once before Dr. Van Reken arrived, and once more after he arrived, as well as at least once that morning before being sought to the clinic. Seizures are evidence that the illness is affecting the brain. The two physicians decided that the best course was to treat the child in Liberia until its condition could be stabilized, and then evacuate it to the United States.

Although evacuation to a closer American hospital in West Germany was also available, the parents of the child insisted that evacuation be made to the United States. The decision on when to evacuate the child is one properly made by the physician on the spot, and was not a breach of the standard of care and skill required of physicians in Liberia.

Claimant alleges that Dr. Lefton was negligent in permitting Dr. Van Reken to admit the child to JFK Hospital over the objections of the family. JFK was known among a number of members of the Embassy Community for its unsanitary conditions. Although Dr. Van Reken acted as a contract physician, he was not an employee of the Department, and the Department is consequently not liable for his actions under the FTCA. I find, however, that Dr. Lefton maintained substantial supervision and control over the care given to the child and retained some responsibility for the child's care. This is especially true with regard to the decision to admit the child to JFK hospital. I find that Dr. Lefton was equally responsible with Dr. Van Reken for that decision.

Based on Liberian law, admitting the child to the JFK Hospital did not constitute negligence. The decision was made for valid medical reasons—the location of Dr. Van Reken at the hospital—and it was one of the two hospitals in the city. Admission of the child did not fall below the standard of care and skill ordinarily employed by physicians in good standing in Liberia since JFK was a facility to which Liberian doctors were regularly referring their patients.

4. *Failure of State Department employees in Washington to ensure that evacuation was carried out by Dr. Lefton*

Claimant alleges that when State Department employees in Washington were notified that medical evacuation was contemplated, and had taken steps to make evacuation available, they should have followed up with Dr. Lefton and ensured that evacuation was actually made on June 4. This allegation has no merit. A determination to evacuate a gravely ill, seizing neonate is one that must be made by the physicians treating the child, not by the Department thousands of miles away. Department officials have no legal duty to make such a decision. The decision to evacuate the child was properly in the hands of the attending physicians, and was properly made when the child's condition had stabilized enough for them to be satisfied that the child could survive the long trip.

5. *Failure of State Department employees in Washington to perform laboratory tests requested, and failure to inform Dr. Lefton promptly of the results of the tests actually performed.*

Claimant alleges that serious errors were made in Washington with respect to the administration of a laboratory diagnostic test, and the reporting of the results obtained to Dr. Lefton in Liberia, and infers without stating that the proper administration of this test would have diagnosed salmonella as the cause of the child's sepsis and meningitis. Our investigation leads us to conclude that there is no merit to this allegation. We understand that the test requested, a counter-immuno electrophoresis (CIE) of the child's

spinal fluid, would not have detected the presence of salmonella bacteria even if it had been carried out. We also understand that the test erroneously carried out in Washington, an immuno electrophoresis, also would not detect the presence of salmonella bacteria allegedly the cause of the child's sepsis and meningitis. Neither test would have affected the diagnosis of the actual infection. Thus, even assuming that mistakes such as those alleged were made, the mistakes did not prevent Dr. Lefton and Dr. Van Reken from diagnosing and treating the cause of the child's sepsis and meningitis. Improper testing when treating a patient does not constitute negligence unless the injuries arose from the wrongful treatment and not from the original condition. *Central Dispensary & Emergency Hospital Inc.* v. *Harbaugh*, 174 F.2d 507 (D.C. Cir. 1949).

6. *Failure correctly to diagnose and treat the salmonella bacteria that allegedly caused baby Tarpeh-Doe's infection and consequent neurological damage.*

Claimant alleges that baby Tarpeh-Doe did not receive adequate care in Liberia from Dr. Lefton and Dr. Van Reken, and that proper diagnosis was not made and proper care was not given until the baby arrived at the University of Colorado Hospital. "By preventing a correct diagnosis of the cause of the baby's meningitis and by failing to make available prompt and proper care," alleges claimant, "the Department of State's health care providers effectively terminated the baby's chances of an injury-free recovery from the illness." There was a "substantial possibility of such a recovery," alleges claimant.

The Department is not liable under the FTCA for actions of Dr. Van Reken, who was only treating the child under contract. Although Dr. Lefton maintained a certain amount of supervision and control over the child's care, particularly with regard to the decision to admit the child to JFK hospital, I will not reach the issue of whether Dr. Lefton retained control over the entire course of the child's treatment. Even assuming that the Department is liable for *all* of Dr. Van Reken's actions—which it is not—claimant has failed to demonstrate any of those actions amounted to negligence.

Claimant does not dispute that Dr. Van Reken diagnosed and properly treated baby Tarpeh-Doe for a staphylococcus infection, and that the staph bacteria was found in cultures of the child's spinal fluid, blood and stools, as well as in cultures of the mother's breast milk. Claimant's allegation is that it was a salmonella bacteria infection and not a staphylococcus bacteria infection that was the real cause of the child's sepsis and meningitis and consequent neurological damage, and that Dr. Lefton and Dr. Van Reken failed to diagnose and treat this salmonella infection. Claimant's only evidence that it was a salmonella infection that caused the sepsis and meningitis is that the child was still ill when admitted to the Colorado University hospital two weeks after treatment began in Liberia, and that the hospital diagnosed a salmonella infection.

Claimant has failed to establish that Dr. Lefton and Dr. Van Reken were unable to diagnose and successfully treat the actual cause of the child's sepsis and meningitis. The first cultures taken by Dr. Van Reken showed staphylococcus bacteria and identified antibiotics effective against the bacteria which were immediately given in adequate dosages. Further-

more, gram stains made of the child's spinal fluid showed gram positive cocci, not salmonella bacteria present. The staphylococcus bacteria found in the cultures and gram stains were the same as those causing the severe mastitis of the mother, and the reasonable inference is that the infections were related. Cultures taken at various times throughout the hospitalization of the child in Liberia would have diagnosed salmonella if it had been present, but did not. The diagnosis of the Colorado University hospital was that the child's severe neurological damage was caused by "gram positive cocci meningitis," and that the salmonella infection was a separate infection. There is nothing in the course of the child's illness in Liberia to indicate otherwise. After the single dose of gentamicin administered by Dr. Lefton before Dr. Van Reken arrived to take over responsibility for the treatment, no antibiotics were administered to treat the staph infection that would have been effective against the salmonella bacteria cultured in the Colorado University hospital. Thus, if a salmonella infection had actually been present and the child given the single dose of gentamicin, as claimant alleges, it would have been found in the spinal fluid, blood, or stool cultures taken at different times during the subsequent course of the child's treatment in Liberia. About mid-point in the child's hospitalization, his condition began to improve markedly, and cultures showed he was free of bacterial infection. It was only the day before the decision to evacuate him to the United States, that the child again became febrile and began seizing. This history is consistent with the diagnosis of a superinfection.

Based on my investigation of this case, I conclude that the salmonella superinfection, the onset of

which was late, which was never cultured or found in the child's spinal fluid, and which was quickly diagnosed and treated, could have caused only minor additional neurological damage to the infant, if at all. The investigation has also led me to conclude that most or all of the severe neurological damage caused by the staphylococcus infection had already occurred when the child was brought in to the Embassy health clinic, and that the treatment received was prompt and effective in eliminating the infection. While it is possible that some neurological damage occurred while treatment to fight the infection was underway, I also note that Dr. Van Reken's treatment was effective as much as possible in reducing the effects of the staphylococcus infection.

7. *Failure to use a chocolate agar culture medium.*

Claimant also alleges that failure to have chocolate agar as a culture medium had an adverse impact on the diagnosis of the organisms causing the child's meningitis. This allegation has no merit. The use of chocolate agar is to detect hemophylus influenza bacteria and the nisseria group of organisms. Neither is alleged to be involved in the child's meningitis.

8. *Improper Hiring, Training, and Supervision of Dr. Lefton*

Claimant alleges that she has "received secondhand information that Dr. Lefton . . . may not have been properly hired, trained or supervised," by the Department. Claimant does not elaborate, however, nor does she allege how this allegedly improper hiring, training or supervision proximately caused the

injuries to claimant's child. Furthermore, the decision not to transfer a doctor to another location is a discretionery function of the government on which an FTCA claim cannot be based. 28 U.S.C. § 2680 (a); *Beins* v. *United States*, 695 F.2d 591 (D.C. Cir. 1982). With regard to improper hiring or training by the government, insufficient evidence on this issue prevents recovery by a plaintiff. *District of Columbia* v. *White*, 442 A.2d 159 (D.C. 1982); *see also Miller* v. *District of Columbia*, 479 A.2d 329 (D.C. 1984).

9. *Failure of the Department to Consult a Neonatologist contacted by the child's grandmother in Colorado.*

Claimant alleges that the Department and Dr. Lefton were negligent in not consulting with a neonatologist, Dr. Gerhart Schrater, contacted by the child's grandmother in Colorado. This allegation is without merit. The child was placed under the care of an experienced doctor in Liberia. Under the circumstances, it would not have been generally accepted practice in Liberia or the United States for a treating physician to consult by telephone or cable with another physician. Furthermore, claimant has not even established that Dr. Schrater would have been willing or able to add anything to the diagnosis and treatment made in Liberia.

B. "Negligence" and Breach of Contract

Claimant alleges that when baby Tarpeh-Doe's mother became pregnant in 1981 in Liberia, that the Department of State or AID had a legal obligation or duty to inform her that she had an option to have her baby in the United States. Claimant alleges that this

option was never explained to Mrs. Tarpeh-Doe and that this failure was both negligent and a breach of contract. Claimant asserts that had Mrs. Tarpeh-Doe been aware of her option she would have elected to have her baby in the United States where he would not have contracted meningitis as a result of exposure to salmonella bacteria.

As a preliminary matter, claimant cannot make a contract claim under the Federal Tort Claims Act. Thus, only claimant's allegation that it was negligent to fail to inform her of her option to have the baby in the United States is presented here. Furthermore, it has already been determined above that salmonella did not cause the meningitis and subsequent neurological injuries to the child, so claimant does not allege negligence that proximately caused any injury. However, even assuming that claimant also alleges that the staphylococcus infection would not have occurred in the United States, and that failure to inform her of a contractual benefit gives rise to a cause of action in negligence under Liberian law, claimant's allegations of negligence fail because Mrs. Tarpeh-Doe was in fact informed that under her contract with the Agency for International Development she had the option of returning to the United States for the birth of her child, or of going to a designated military hospital in West Germany. This information was given during the orientation sessions she attended for new AID employees in Washington before leaving for her post in Liberia. Ms. Awantang, the Embassy medical technician, also informally counseled Mrs. Tarpeh-Doe while she was pregnant to have her baby outside of Liberia. It is not for the Department to speculate why Mrs. Tarpeh-Doe chose to have her baby in Liberia, but the decision was certainly made with the knowledge that other options

were available. Significantly, Mrs. Tarpeh-Doe did not come to the Embassy health clinic for any prenatal care, and never informed Dr. Lefton that she was pregnant. The baby's father was Liberian, and Mrs. Tarpeh-Doe elected to have all her obstetrical care, including delivery, done by a local physician. Even after the child became ill Mrs. Tarpeh-Doe did not have him examined by the Embassy health clinic personnel. It was only by chance that the parents met Nurse Clement on the street as they searched for their local physician, and that therefore she recommended they bring the child to the Embassy clinic. Under all the circumstances, I do not find credible Mrs. Tarpeh-Doe's allegations that she was never informed of her options and was unaware of them.

C. Breach of Warranty

Claimant alleges that Dr. Van Reken made an express warranty to the claimant and her husband that he could cure the baby, and that based on this warranty the family agreed to permit Dr. Van Reken to treat the baby and Dr. Lefton reversed his decision to evacuate the child by airplane to the United States for treatment. Claimant can not bring a breach of warranty claim, which is fundamentally one based on contract, under the Federal Torts Claims Act. Nevertheless, even assuming that the claim could be brought under the Federal Tort Claims Act against the Department, the Department does not find claimant's allegations that Dr. Van Reken gave such a "warranty" to be credible. Dr. Van Reken denies giving such a warranty, and the written medical record supports Dr. Lefton's recollection that he never gave an unqualified promise to medevac the child that was later reversed based on Dr. Van Reken's representa-

tions. Dr. Van Reken was the best qualified and most experienced physician in Liberia for treating neonatal meningitis, and given the critical condition of the child when he was finally brought in to the Embassy clinic, Dr. Van Reken's care was the obvious choice.

III. CONCLUSION

Based on the total investigation of this claim, I am led to conclude that there was one instance of negligence by Department employees in this case: the failure to perform the correct laboratory test in Washington. I also conclude that the negligence did not cause any damages. In an effort to avoid litigation expenses, a settlement of this claim for $50,000 in the form of a structured settlement was offered and rejected by the claimant. There is no basis to increase that offer.

I recommend that this claim now be denied.

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